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IN THE

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1931.**

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**No. ~~282~~ 104**

BANKERS POCAHONTAS COAL COMPANY,
PETITIONER,

*v.*

COMMISSIONER OF INTERNAL REVENUE.

---

**No. ~~288~~ 105**

D. J. F. STROTHER, PETITIONER,

*v.*

COMMISSIONER OF INTERNAL REVENUE.

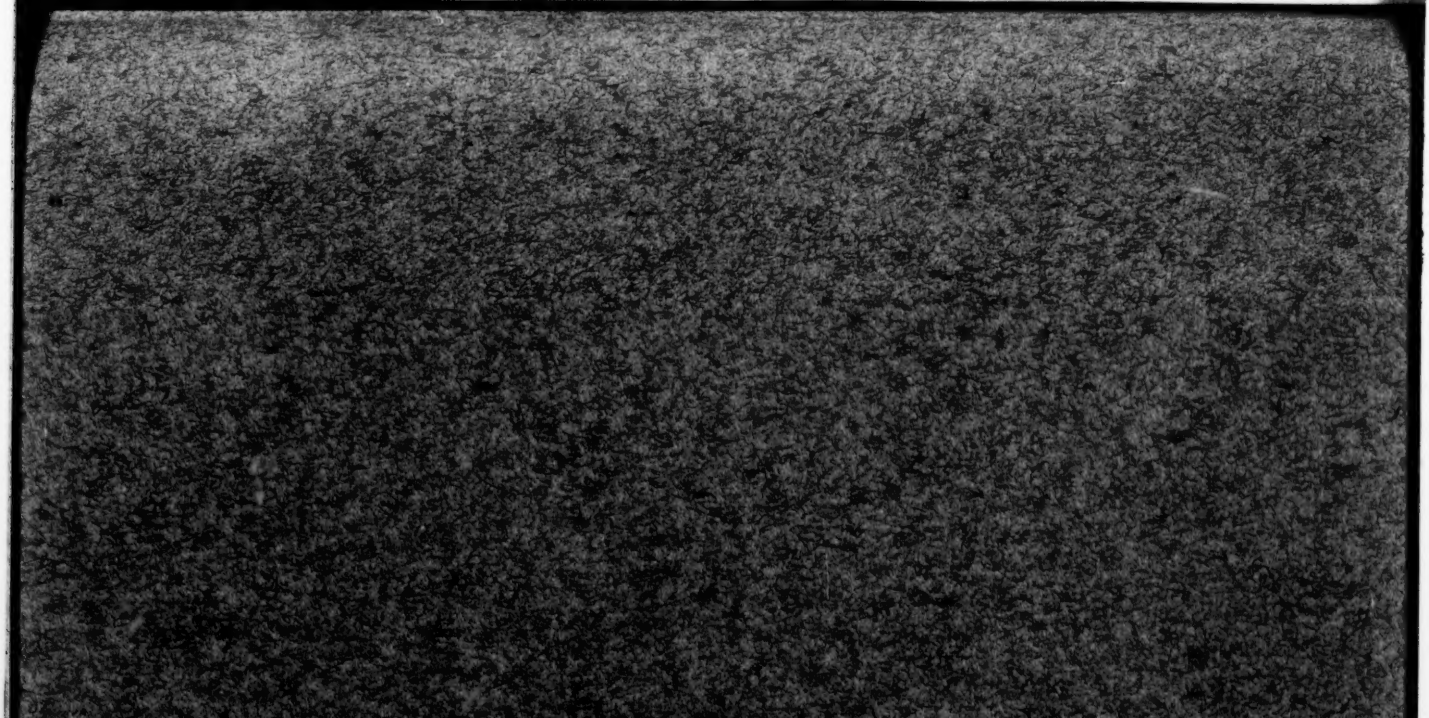
---

**PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

---

WELLS GOODYKOONTZ,
CAMDEN R. McATEE,
*Attorneys for Petitioners.*

MASON, SPALDING & McATEE,
GOODYKOONTZ AND SLAVEN,
*Of Counsel.*



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---

## PETITION FOR WRITS OF CERTIORARI.

---

*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Above petitioners respectfully petition that writs of certiorari issue herein for cause as follows:

### The Judgments Below.

For review of the judgments of the United States Circuit Court of Appeals for the Fourth Circuit en-

tered respectively in causes, *No. 3214, D. J. F. Strother* v. *Commissioner of Internal Revenue,* and *No. 3215, Bankers Pocahontas Coal Company* v. *Commissioner of Internal Revenue,* in said Court, (*said cases being previously heard together*), on January 27, 1932 (Record, page 135) (Opinion on January 25, 1932) (Record, pp. 119-132) (55 F. (2) 626), affirming (and reversing in parts not here important), the decision of the United States Board of Tax Appeals (Record, page 71) (Findings and opinion on January 22, 1930, Record, pp. 37-57) (18 B. T. A. 901), that deficiencies in income and profits tax for the years 1920 to 1926 in the amount of $39,171.05 were owing by petitioner company, and deficiencies in income taxes of $5,806.11 were owing by petitioner Strother.

(Certified copies of the record in each case, showing the pleadings, findings and opinion of the Board, petition for review, statement of evidence, proceedings and opinion of the Court of Appeals, accompany this petition.)

**Questions Presented.**

The proceedings involve the alleged liability of petitioner company for income and profits taxes for the years 1920 to 1926, inclusive, and of its stockholder, petitioner Strother, for income taxes for the years 1919 to 1926, inclusive, as determined against petitioners by the Commissioner of Internal Revenue, the substantial questions being:

1(*a*). Whether the purchase money proceeds of sales of coal in place effected in 1902 and pay-

able by the grantees in subsequent years in determinable amounts without interest as installments of said purchase money, are taxable income when collected in the years in controversy by petitioner company, who, at, before and after March 1, 1913, always owned the unconditional claim then existing to recover or receive the unpaid part of said purchase money in the several subsequent years, and did thereafter collect same.

1(*b*). Whether the distribution of said purchase money proceeds to the stockholder Strother constitutes taxable income to him in said years.

2. Whether Congress intended by the Revenue Acts to tax said proceeds of sale, and if so—

2(*a*). Whether the grantor of coal sold in place is a lessor, and as such entitled to the statutory depletion allowances of a lessor, and if so—

2(*b*). Whether the excess amount of minimum payments received in any year from the grantee over the payment thereby made for coal actually mined within the year is not subject to any depletion allowance.

3. Whether a judgment against a Collector, who was therein defended of record by the Commissioner of Internal Revenue, and which judgment involves the same subject matter of reason-

able depletion as is presented herein, and was duly paid by the United States, is *res adjudicata* against the Commissioner as to the amount of depletion, if any, allowable to petitioner company.

The Circuit Court of Appeals affirmatively answered each question except question 3, which was negatively answered, and petitioners would show its resulting decision is thereby in conflict with the weight of authority and decision upon these legal questions which affect many taxpayers.

**Constitution, Statutes and Regulations Involved.**

Same are contained in the Appendix to the supporting Brief.

**Statement.**

In 1901 and 1902, certain predecessors in title of petitioner company, as fee owners of West Virginia coal lands, valueless except for their coal content (R. p. 39), demised the coal in place to various operators for a fixed price payable upon the basis of each ton of coal mined by the operator in each year thereafter, with a fixed lump sum as the minimum annual payment regardless of whether coal representing that amount was mined within the year (R. pp. 40-41). The operators and their successors have always since possessed the acreage and mined the coal therefrom (R. p. 39). Said demise under the laws of West Virginia effected a sale of coal in place (R. p. 49; p. 123, Opinion of the lower Court).

In 1912, petitioner company acquired the fee title to said acreage subject to said previous sales of coal in place, and also acquired all the rights of its predecessors in title to collect the considerations payable by the operators, and has always since collected same when paid in the subsequent years, receiving thereby the proceeds of the minimum payments as well as any payments for coal actually mined each year (R. p. 39). Petitioner company, upon a cash basis (R. p. 46) each year distributed all its receipts to its stockholders, excepting amounts retained for payment, if necessary, of the taxes here in controversy (R. p. 72).

After adoption of the XVI Amendment and passage of the Revenue Acts, both petitioners in their tax returns disclosed said payments as being the proceeds of sales of coal in place effected before the Amendment, and consequently not subject to tax (R. pp. 38, 46, 49). However, the Commissioner of Internal Revenue for the years 1914-1919 held petitioner company and the operators were lessor and lessees, and said payments were gross income, including a capital return, and subject to a depletion allowance of 3.6 cents per ton of coal mined, to eliminate the capital return. The Commissioner thereupon assessed and required petitioner company thereby to pay taxes of about $6,000 to the proper Collector upon the alleged net income so ascertained (R. p. 47). Petitioner company, thereupon, sued said Collector in the United States District Court in West Virginia to recover said taxes for cause, either, that same were not taxable, being the proceeds of purchase money contracted for before the XVI

Amendment, existing unconditionally on March 1, 1913, and payable thereafter, or alternatively, if petitioner company was a lessor and not a vendor, that the depletion unit allowable to return the capital should be fixed in a greater amount (R. p. 47). At the trial of said action, in which the Commissioner of Internal Revenue by his counsel was defending the Collector, petitioner company obtained a final judgment fixing a depletion unit of 5 cents per ton, and a consequent recovery of a substantial part of the taxes, which judgment was duly satisfied and has since remained in full effect (R. p. 47).

Contemporaneous with and subsequent to said litigation, said Commissioner determined and assessed petitioner company with income taxes of about $40,000 (R. p. 38) for the years 1920-1926, holding petitioner was a lessor, allowing a depletion of 3.6 cents per ton, and refusing to give effect to the 5 cent depletion rate established by said judgment (R. pp. 46, 47, 48).

As to petitioner Strother, the Commissioner increased his net income for the several years by his entire receipts from said purchase money distributions, without any allowance for depletion reserves so received, and determined the resulting deficiencies of tax against him.

Petitioners, by their appropriate appeals, petitioned the United States Board of Tax Appeals for redeterminations of said several deficiencies, claiming petitioner company was neither the owner nor lessor of any mine, and the alleged income was not taxable to either petitioner, since same represented purchase

money payments upon sales of coal in place effected before March 1, 1913, and payable thereafter without income increment, and claiming—in the alternative—that if the alleged income was taxable after allowance of depletion deductions, the 5 cent depletion rate established in previous litigation between the parties was *res adjudicata* thereof, and should be allowed instead of the 3.6 cent rate (R. pp. 7, 8, 18, 19). The Board of Tax Appeals, without denying that the demise of 1902 effected a sale of coal in place according to the property rule of West Virginia (R. p. 49), held: *First,* the contracts for federal tax purposes established the relation of lessor and lessee between petitioner company and the operator, making thte payments gross income subject to depletion allowances (R. p. 50); *Second,* that bonuses, or minimum payments in excess of payment of coal actually mined in the year, are gross income not subject to depletion allowances (R. pp. 49, 70); and *Third,* the depletion rate of 5 cents per ton determined in previous litigation between the parties over the same subject matter was not thereby allowable to petitioner company (R. p. 52), and said Board determined total deficiencies of $39,171.05 against petitioner company (R. p. 71), and thereby of $5,806.11 against petitioner Strother.

By their petitions for review (R. p. 73) petitioners applied to the Circuit Court of Appeals for the Fourth Circuit for review of said Board decision, alleging as errors: (1) That such payments were not taxable income (R. p. 81); (2) Alternatively, that the adjudged 5 cent depletion rate was applicable (R. p. 81); and (3)

That any depletion was allowable upon coal paid for and not merely upon coal mined (R. p. 82); and, (4) As to petitioner Strother, that he received no taxable income, or if so, that he was entitled to elimination of depletion reserves distributed to him.

The Circuit Court of Appeals held, *First,* the contracts of 1902 effected sales of coal in place (R. p. 123); *Second,* that, nevertheless, Congress intended to tax said sales proceeds by returning capital through lessor depletion allowances (R. p. 124); *Third,* that the West Virginia judgment was not binding upon the Commissioner and hence did not establish the 5 cent depletion rate (R. p. 127); and *Fourth,* affirmed the Board determination whereby the minimum annual payments in excess of payment for coal actually mined were held to be bonuses returnable as gross income without allowance of depletion deductions against same (R. 132). It further held the Strother case was substantially to be determined by its decision of the company case (R. p. 132). Incidental issues not here of importance are omitted as immaterial.

Original and supplemental applications for rehearing (R. pp. 137, 171) were denied by the Court (R. pp. 169, 185) and its mandate has been stayed pending the filing of this application for certiorari (R. 185) in proper time.

**Specifications of Error.**

The Board and Court below erred (references to opinion of each):

1. In deciding that the purchase money proceeds of sales of coal in place effected in 1902 and payable by

the grantees in subsequent years in determinable amounts without interest as installments of said purchase money, are taxable income to petitioner company who, at and before March 1, 1913, owned the unconditional claim then existing to recover or receive the unpaid part of said purchase money in the several subsequent years, and did thereafter collect same (R. pp. 49, 124).

1(*b*). In deciding that the distribution of said proceeds to the stockholder Strother is taxable income to him (R. pp. 57, 135).

2. In deciding that Congress intended by the Revenue Acts to tax said proceeds of sale (R. p. 124.)

3. In deciding that the grantor of coal sold in place is a lessor, and as such entitled to the statutory depletion allowances of a lessor (R. pp. 51, 124).

4. In deciding that the excess amount of minimum payment received in any year from the grantee over the payment thereby made for coal actually mined within the year is not subject to any depletion allowance (R. pp. 49, 134).

5. In deciding that the judgment against a Collector, who was therein defended of record by the Commissioner of Internal Revenue, and which judgment involves the same subject matter of reasonable depletion as is presented herein, and was duly paid by the United States, is not *res adjudicata* against the Commissioner

as to the amount of depletion, if any, allowable to petitioner (R. pp. 52, 127).

**Reasons Relied On for Allowing the Writ.**

1. The Circuit Court of Appeals has rendered herein a decision contrary to the XVI Amendment, and in conflict with decisions of this Supreme Court of the United States and of other Circuit Courts of Appeals on the same subject matter.

2. The Circuit Court of Appeals has decided an important question of Federal taxation in a way in conflict with a decision of another Circuit Court of Appeals; it has further decided an important question of *res adjudicata* in a way probably untenable and which should be settled by this Court.

3. The present case involves questions of general interest, affecting not alone the tax liability of petitioners, but that of many other taxpayers as well, involving basic issues as to taxable or non-taxable income, the power to levy income taxes under the XVI Amendment, and the effect of prior litigation upon the rights of parties, on which matters an authoritative ruling of this Court is of public importance, and is respectfully requested herein.

There is presented herewith a supporting brief, showing more fully petitioner's views on the questions involved.

WHEREFORE, the premises considered, your petitioners respectfully pray for issue of writs of cer-

tiorari to review the judgments of the Circuit Court of Appeals for the Fourth Circuit in the aforesaid cases of petitioners, and for entry of all proper orders thereto required and necessary, and for all such other and further relief as may seem meet and just.

WELLS GOODYKOONTZ,
CAMDEN R. McATEE,
*Attorneys for Petitioner.*

## PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

---

Supplementing their joint petition herein, and in support of same, petitioners respectfully state:

### Opinion of the Court Below.

The opinion of the Court of Appeals for the Fourth Circuit, in these cases heard together, was rendered on January 27, 1932; is reported in 55 Fed. (2nd) 626, and appears at pages 120-134 of the Record.

The findings of fact and opinion of the United States Board of Tax Appeals were rendered on January 22, 1930, are reported in 18 B. T. A. 901, and appear at pages 37-57 of the Record.

### Jurisdiction.

(*a*) The jurisdiction of this Court under Section 240 of the Judicial Code as amended (U. S. C., Title 28, Section 207) and under Section 1003(*a*) (*b*) of the Revenue Act of 1926 (44 St. (Part 2) 9, C 27) is invoked.

(*b*) The date of the decree of the Circuit Court of Appeals sought to be reviewed is January 27, 1932 (R. p. 135). A first petition for rehearing was overruled on March 7, 1932 (R. p. 170), and a second petition for rehearing was overruled on April 29, 1932, with stay of mandate for presentation of petition for certiorari on or before May 23, 1932 (R. p. 185). The

petition for certiorari was filed in this Court on May 23, 1932.

(*c*) These proceedings, originating in the United States Board of Tax Appeals, involve the power of the Commissioner of Internal Revenue to assess and collect additional income-excess taxes from these petitioners for 1919 to 1926 (R. p. 120, 132).

(*d*) The jurisdiction of this Court to review said proceedings is recognized in Rule 38 of this Court, and in *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 727.

**Statement of Case.**

The full statement of essential facts made in the petition is here adopted in the interest of brevity.

**Reasons for Review and Specifications of Error.**

These are here repeated in substance as captions in the following

**Argument.**

**Reason: The decision is contrary to the XVI Amendment and conflicts with decisions of this Court and of other Circuit Courts of Appeals on the same subject matter.**

*Questions:*

1(*a*) *Whether the purchase money proceeds of sales of coal in place effected in* 1902 *and payable by the grantees in subsequent years in determinable amounts without interest as installments of said purchase money, are taxable income to petitioner company who,*

*at and before March* 1, 1913, *owned the unconditional claim then existing to recover or receive the unpaid part of said purchase money in the several subsequent years, and did thereafter collect same.*

1(*b*) *Whether the distribution of said proceeds to the stockholder Strother is taxable income to him.*

The lower court says (R. p. 123):

> "We shall assume for purposes of this decision, that the law of West Virginia is that a mining lease constitutes a sale of the mineral in place."

And therefore, we have sales of coal in place effected in 1902 for a consideration expressed in the contracts (R. 41) and payable to the grantor:

> —"Ten cents for each and every ton of coal mined"—and
>
> —"Five thousand dollars for each and every year as a minimum * * * whether the quantity of coal mined shall produce that amount of royalty or not."

Petitioner company never owned any coal in place, and in 1912 only succeeded to the claim of the grantor then and subsequently existing to receive and collect said payments in the later years.

The simple question from these undisputed facts is whether the XVI Amendment authorizes levy of income tax upon the subsequent receipt of proceeds of a claim existing on and before March 1, 1913, and it

is submitted same must be answered in the negative and contrary to the conclusion of the lower court.

The XVI Amendment "conferred no new power of taxation" (*Stanton* v. *Baltic Mining Company,* 240 U. S. 103, 110); it merely removed the principle of the *Pollock Case* (157 U. S. 429), that an income tax was a charge upon invested property and thereby was unconstitutional as a direct tax not apportioned, and that its enactment as an excise tax subject only to the constitutional rule of uniformity did not make it constitutional (*Brushaber* v. *Union P. R. Co.,* 240 U. S. 1, 18). In *Evans* v. *Gore,* 253 U. S. 245, 260, 261, the genesis of the Amendment is reviewed, including reference to the message of Governor Hughes to the New York Legislature expressing fear that the Amendment might extend to excepted subjects, and reference to the assurances to the contrary thereby obtained.

This Court has not precisely decided the question, but numerous decisions of lower courts hold that subsequent payments, resulting from a right to money established and accrued before the XVI Amendment, are not subject to income taxes, being only the return and collection of capital without income increment.

Thus, in *Saunders* v. *Commissioner,* 29 F. (2) 832, (C. C. A. 3), an inventor in 1911 sold an invention covered by a patent application and in 1920 received $25,000 in payment therefor, and it is held same was a return of capital and not taxable income. In *United States* v. *Guinzberg,* 278 F. 363 (C. C. A. 2), a dividend declared before March 1, 1913 is held not taxable income when thereafter received. In *Park* v. *Gilligan,*

293 Fed. 129, a claim for damages existing before and on March 1, 1913 and realized by payment in 1916 is held not to be income when distributed in dividends to stockholders. In *Schneider* v. *Duffy*, 43 F. (2) 642, taxpayer in 1916 agreed to accept 1,500 shares of stock, deliverable 300 shares per year as consideration for his certain agreements, and it was held any income from the transaction was received in 1916 and not when the stock was delivered.

In *Old Colony R. R. Co.* v. *Commissioner*, — U. S. — (52 S. Ct. 211), taxpayer had received bond premiums before 1913 and the regulations permitted same to be amortized over the life of the bond, but this Court said:

> "—these premiums could not be income for any other year than that in which they were received. That income had become capital prior to the adoption of the Amendment and could not be reached by a subsequent income tax act."

By analogy, herein the coal in place had been converted into the chose in action acquired by petitioner company before adoption of the Amendment, and its subsequent realization thereon is not income; if the bond premium contracted to be paid in 1904 in the cited case, was not collected until 1914, we have the present case.

In *Strattons Independence* v. *Howbert*, 231 U. S. 399, 414, 415, this Court said:

> "The sale outright of a mining property might fairly be described as a mere conversion of the capital from land into money."

In *Crile* v. *Commissioner*, 55 F. (2) 804 (C. C. A. 6), we read:

> "Where there is an intent to create in the 'lessee' an interest in the property itself—as by way of purchase—even though that interest may be forfeitable by failure to perform conditions subsequent, and this intent is made manifest by the instruments duly executed to carry it into effect, the attending payment is a return of capital, and should be so regarded, at least prior to forfeiture and reversion."

If the sale proceeds are not taxable income to the petitioner company, they are not taxable income to the petitioner Strother (Cf. *Park* v. *Gilligan, supra*).

It follows that the lower court erred in holding that purchase money proceeds of sales in place effected in 1902 constituted taxable income when collected in later years, and that its decision conflicts with decisions of this Court and other federal courts.

*Question:*

2. *Whether Congress intended by the Revenue Acts to tax said proceeds of sale.*

2(*a*). *Whether the grantor of coal sold in place is a lessor, and as such entitled to the statutory depletion allowances of a lessor.*

While conceding that sale of the coal in place was effected by the 1902 demise, the lower court contradicts this in (R. p. 124) deciding the vendor is a lessor entitled to depletion allowances for the return of capital

from the sale proceeds when collected. If said proceeds, as presented in the previous paragraph of this brief, are here held to be only the return of a capital claim existing and owned by petitioner before the Amendment, such conclusion becomes immaterial, but pending decision of that question, same must be considered.

In the first place, Congress could not tax the proceeds of the capital claim for reasons previously given. To do so violates the constitutional provisions which limit the power of Congress to tax income and no more, under the XVI Amendment.

This Court said in *Nichols* v. *Coolidge*, 274 U. S. 531, 541:

> —"under the mere guise of reaching something within its powers, Congress may not lay a charge upon what is beyond them. Taxes are very real things and statutes imposing them are estimated by practical results."

In the second place, as a sale in place is a severance of the estate of the grantor, such grantor is not a lessor, and as depletion is allowed by Congress only upon the taxpayer's interest in the mine, the grantor has no depletable interest after the sale in place was effected.

The lower court (R. p. 124) adverts to discussions by this Court of mining as a business in which both lessor and lessee are interested, but a grantor who receives royalties in return for the thing sold is not interested in the mining business. Here an estate, the coal in place, was sold. In *Burnet* v. *Logan*, 283 U. S. 404,

very similarly, taxpayer sold certain stock, taking payment in cash and royalties on ore mined; thereupon, the Commissioner sought to find income in the royalty receipts by allowance of depletion deductions, but this Court put aside the contention (page 412), saying:

> "The 1916 transaction was a sale of stock—not an exchange of property. We are not dealing with royalties or deductions from gross income because of depletion of mining property."

Petitioner here was not in the mining business because its predecessor had previously sold the coal in place to operators who mined same as their own, taking and retaining possession of the acreage and coal for that purpose in the ensuing years.

A sale of mineral in place effects a complete severance of the estate conveyed (*Group No. One Oil Corporation* v. *Bass*, 283 U. S. 279), wherein certain alleged immunities of a grantor were declared lost to its grantee, as distinguished from their preservation to a lessee in the later decision of *Burnet* v. *Coronado Oil and Gas Co.*, — U. S. — (decided April 11, 1932). The payments by the vendee for coal bought in place are capital expenditures and not the deductible rentals of a lessee (*Jefferson Gas Coal Co.* v. *Commissioner*, 52 F. (2) 120 (C. C. A. 3)).

Congress provides for allowance of depletion deductions only to the owner and to the lessor and lessee of a mine (Cf. Statute quoted in Appendix), and hence grants no depletion to a vendor after sale of his interest in the property. The depletion deduction is not a matter of right, and express authority therefor must

be found in the Revenue Acts (*Stanton* v. *Baltic M. Co.*, 240 U. S. 103; *Burnet* v. *Thompson Oil and Gas Co.*, 283 U. S. 301). The essential test is the interest of the claimant in the property, for as said in *Weiss* v. *Wiener*, 279 U. S. 333, 336 (quoted in other respects (as we believe erroneously) in the opinion below);

> —"he must show an interest in the property and a present loss to make the statute apply."

In *Darby Lynde Co.* v. *Commissioner*, 51 F. (2) 32 (C. C. A. 10) (Cert. denied 52 S. C. 40), the discovery value depletion basis available to a partnership is denied to a successor corporation created and owned by the partners. In *Pugh* v. *Commissioner*, 49 F. (2) 76 (C. C. A. 5) (Cert. denied, 52 S. C. 22), a taxpayer is held to have lost his right to depletion of his lease interest after conveyance of such interest on the ground he thereby has become a lessee without investment. In *South Vernon Oil Co.* v. *Hopkins*, 49 F. (2) 1028 (C. C. A. 5), we have the same conclusion and the reason stated that the sale severed the depletable interest in the property.

Third, in case of a severance of interest, of a sale, the Congress has in the Revenue Acts made other provisions, entirely apart from depletion, for taxing any capital gain. Thus, in Texas, where, as in West Virginia, the state rule of sale of mineral in place governs such matters, a taxpayer leased ⅞ of the mineral, while retaining the other ⅛ interest, and received a cash bonus and royalties. That he thus sold the ⅞ interest in place, making his bonus receipt subject to

the special tax rate upon a capital gain, and that his retained interest remained subject to depletion is the decision in *Ferguson* v. *Commissioner*, 45 F. (2) 573 (C. C. A. 5). In *Harmel* v. *Commissioner*, — F. (2) — (February 23, 1932) (C. C. A. 5), the same conclusion is reached upon authority of *Group No. One Oil Corporation* v. *Bass*, and other decisions of this Court. In *Alexander* v. *King*, 46 F. (2) 235, in a very similar case, the capital gain provision was held inapplicable because the Oklahoma rule of property does not recognize a sale of mineral in place and ascertains the parties to be lessor and lessee. (Cf. *Burnet* v. *Coronado Oil and Gas. Co.*, — U. S. — (*supra*).)

The lower Court (R. p. 124), after finding petitioner company stands in the shoes of a grantor and not of a lessor as the result of the sale in place, nevertheless decides that petitioner is a lessor and that the subsequent payments are income, on the ground (R. p. 124) that:

> "The federal courts must respect the local laws of property laid down by the courts of the state, but the power of Congress to tax must be judged by the realities of the situation and not by the logic of state rules of property, pushed inexorably to their extreme."

Such opinion conclusion flows from discussion of earlier decisions of this Court with especial emphasis upon cases in which certiorari was denied (R. p. 123), and the statement (R. p. 125) that later decisions of this Court (cited in the opinion), are not progressive to the acceptance of the state rule of property because (R. p. 125):

> —"it is obvious that each of these decisions turned upon the fundamental question whether the property sought to be taxed came within the purview of the taxing statutes."

Such precise fundamental question is the gravamen of this case, and the lower court—like the Board in its decision of this case—labors in a twilight of tax decisions now lifted by this Court. Such zone of error has arisen by acceptance of denials of certiorari as being a contradiction of previous decisions of this Court; notwithstanding, this Court has repeatedly declared a denial of certiorari does not have such an effect (*United States* v. *Carver,* 260 U. S. 482; *Atlantic C. L. Co.* v. *Powe,* 283 U. S. 401), and expresses no opinion upon the merits of said cases.

In other words, a supposed Federal rule of property, instead of the state rule of property, was reared by the Board as decisive herein of the taxability of the purchase money payments, and previously such supposed Federal rule had its effect upon the decision of Circuit Judge in the West Virginia litigation of petitioner (R. p. 50). The lower court restates and relies upon such rule herein as being established by numerous denials of certiorari (R. p. 123). The announcement of said Federal rule, as in disregard of the state rule, made in May, 1929 in *Hirschi* v. *United States,* 67 Ct. Cl. 637 (Cert. denied, 280 U. S. 576), is quoted (R. p. 51) in the Board opinion as follows:

> "The Federal Government is not limited in its selection of subjects for taxation by the construction of the State courts as to the property

> rights of individuals, provided the subject taxed was primarily a proper subject for taxation. *Congress in passing a revenue act does not, and is not called upon to suit the revenue system of the country to the varying and conflicting decisions and laws of the different states.*" (Italics supplied.)

This Federal rule of property found support in *Berg* v. *Commissioner*, 33 F. (2) 641 (Cert. denied, 280 U. S. 598), decided in June, 1929, and in the earlier decision of *Rosenberger* v. *McCaughn*, 25 F. (2) 699 (C. C. A. 3) (Cert. denied, 278 U. S. 604), and the Board decision in January, 1930, is thus but another expression of such rule. Afterwards, this Court definitely struck the rule down in *Poe, Collector* v. *Seaborn*, 282 U. S. 101, 117, saying:

> "Finally, the argument is pressed upon us that the Commissioner's ruling will work uniformity of incidence and operation of the tax in the various states, while the view urged by the taxpayer will make the tax fall unevenly on married people. * * * The answer to such argument, however, is that the constitutional requirement of uniformity is not intrinsic, but geographic. *Billings* v. *United States*, 232 U. S. 261; *Head Money Cases*, 112 U. S. 580; *Knowlton* v. *Moore*, 178 U. S. 41. And differences of state law, which may bring a person within or without the category designated by Congress as taxable may not be read into the Revenue Act to spell out a lack of uniformity. *Florida* v. *Mellon*, 273 U. S. 12."

Again this Court struck the rule down in the income tax case of *Phillips* v. *Commissioner*, 283 U. S. 589. It gave the state rule of sale in place full effect in the income tax case *Group One Oil Corp.* v. *Bass*, 283 U. S. 279. It upheld the state rule of property, but as sometimes unimportant, in the excise tax cases of *Tyler* v. *United States*, 281 U. S. 497; *Crooks* v. *Harrelson*, 282 U. S. 55; *Bromley* v. *McCaughn*, 280 U. S. 124.

In its decision of *Crooks* v. *Harrelson* (p. 63) this Court expressly disapproved *Steedman* v. *United States*, 63 Ct. Cl. 226 (Cert. denied 275 U. S. 528) upon which the Hirschi decision was substantially rested by the Court of Claims.

Adherence to state rules of property in determining the ownership of property as the base of liability for income taxes springs from early decisions of this Court (*McCormick* v. *Sullivant*, 10 Wheat. 192, 202; *United States* v. *Fox*, 4 Otto 315), and is precisely reflected in later decisions (*Poe* v. *Seaborn*, 282 U. S. 101).

Lastly, the ruling of the lower court herein is not logical in results. If notwithstanding a sale in place, the vendor is held entitled to depletion, although he has parted with the property, this conflicts with the established rule that depletion is incident to the property interest. It deprives the vendee, as the sole owner of the property, of some part of his depletion deduction. It turns his capital payments of installments of the purchase money into rentals in the hands of the recipient. It creates an allowance not authorized by law.

It is submitted the Congress did not intend to tax said purchase money receipts, and that the vendor is not a lessor entitled to depletion allowances; that the errors of the lower court in so holding are apparent and in substantial conflict with decisions of this and other Federal courts.

**Reason 2. An important question of federal taxation is decided in a way in direct conflict with a decision of another Circuit Court of Appeals.**

*Question:*

2(*b*) *Whether the excess amount of minimum payment received in any year from the grantee over the payment thereby made for coal actually mined within the year is subject to any depletion allowance.*

Any depletion allowable to petitioner company is limited by the lower court and Board to the payment measured by coal actually mined and paid for within any year, and thereby is disallowed upon any part of an annual minimum payment not representing coal mined. This limitation deprives petitioner company of depletion upon more than 2,000,000 tons of coal in the controversial years (R. pp. 160-1).

The Regulations of the Commissioner of Internal Revenue under the depletion section of the Revenue Acts allow consideration of bonus payments in computing the unit rate. The Board, in its decisions (R. p. 49), as applied herein, has disapproved the Regulations, and eliminated such bonus payments, meaning, in this case, payments not based upon coal actually

mined within the year. In this case, the Commissioner submitted a tax computation based upon the Board opinion with the protest that he stood committed to the principle (R. pp. 108, 157-8) of allowing depletion upon coal paid for instead of coal actually mined in a taxable year.

The lower Court herein, by affirming the Board, has approved its elimination of coal paid for but not mined as an element of the computation of depreciation. This question of defining the depletable base reached the Courts about the same time in the present case, and also in *Murphy Oil Company* v. *Burnet*, 55 F. (2) 17 (C. C. A.-9), wherein the Commissioner by cross petition for review raised the issue, and that Court reversed the Board and precisely decided the question on January 11, 1932, thereby entirely sustaining the regulations of the Commissioner. The opinion by Judge Wilbur is complete. The subsequent decision of January 27, 1932, herein, affirming the Board, places two Circuit Courts of Appeal in direct conflict upon this basic question affecting almost every lessor and lessee of a mineral deposit.

Reference is made to the argument of petitioners upon this conflict in their petition for rehearing (R. pp. 157-162).

**Reason 3: The decision of a question of res adjudicata is probably untenable, and should be decided by this Court.**

*Question:*

3. *Whether a judgment against a Collector, who was therein defended of record by the Commissioner of*

*Internal Revenue, and which judgment involves the same subject matter of reasonable depletion as is presented herein, and was duly paid by the United States, is res adjudicata against the Commissioner as to the amount of depletion, if any, allowable to petitioner.*

The undisputed facts (R. p. 47) are thus found by the Board:

> —"said judgment was duly paid by the United States. In said action the Bankers Pocahontas Coal Co., one of the petitioners herein, was plaintiff; plaintiff petitioner appearing in its own right and the collector as defendant, who was defended in said action by the United States District Attorney and the Solicitor of Internal Revenue (now General Counsel). In this proceeding and in said court action the subject matter of the action and of these proceedings is the same, namely, the depletion unit allowable in computing the amount of such depletion deduction as will return to the taxpayer the capital value existing in the coal content of the corporation's property as of March 1, 1913."

The lower Court (R. pp. 126-7) thus decides the question:

> "Hence the taxpayer claims that the question is no longer open between it and the Government, since it is a general principle that when a fact is distinctly put in issue, and directly determined by a court of competent jurisdiction between the parties in a law suit as a ground for recovery, it cannot be disputed in a subsequent suit between the same parties or their privies, even if the second suit is for a

different cause of action. *Southern Pacific R. R.* v. *U. S.*, 168 U. S. 1, 48; *New Orleans* v. *Citizens Bank*, 167 U. S. 371.

"The rule is applicable, however, only when the subsequent suit is between the same parties or their privies. The taxpayer maintains that we have had situation in the present litigation because the United States in reality is its opponent in both cases, being represented by the Collector of Internal Revenue in the prior suit, and by the Commissioner of Internal Revenue now. But the argument is refuted by the decision in *Sage* v. *United States*, 250 U. S. 33, where it was expressly ruled, against the protest of the Government, that the court was not bound by a judgment in a former suit concerning the same subject matter between the taxpayer and the Collector of Internal Revenue, because a suit against a Collector of Internal Revenue is personal and its incidents, such as the nature of the defenses open and the allowance, of interest, are different. This ruling has recently been cited with approval by the Supreme Court in *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 430. The decision of the District Court for the Southern District of West Virginia was therefore not binding upon the Commissioner, and he had the authority to determine anew, as a question of fact, what allowance should be made for the depletion of the mine."

The opinion statement that taxpayer maintains "The United States in reality is its opponent in both cases" is, at most, derived from the amended petition (R. p. 19), stating:

> "That in the action aforesaid, and herein, the parties are identical, being petitioner suing in its own right, and the United States as defendant, represented respectively by its Commissioner of Internal Revenue, and by the respondent, Commissioner of Internal Revenue; that said action was defended for the United States by the United States District Attorney and by Robert A. Littleton, Special Attorney from the office of the General Counsel of the Commissioner of Internal Revenue which was known at said time as the Solicitor's office, as attorneys of record, and the details of defense and satisfaction of said judgment were handled by said Special Attorney, or Attorneys, representing the respondent herein."

But, if the *Sage* case decides the Collector of Internal Revenue is not the United States, it does not follow that the Commissioner of Internal Revenue is the United States—which is the erroneous deduction of the lower court here presented for review. In fact, whether the *Sage* case is *stare decisis* that a judgment against a Collector is not binding upon the United States, is open to examination. Therein, it appears taxpayer, having recovered a part of certain taxes against a Collector, was authorized by subsequent legislation to recover additional parts thereof from the United States. The Government relied upon the former judgment as a bar to the further recovery, notwithstanding the subsequent legislation, and compelled taxpayer to contend the judgment was no bar. Mr. Justice Holmes says (250 U. S. 33, 36-38):

> "The former judgment is not a bar."

and after proceeding with comment upon the status of an action against a Collector and the judgment therein, concludes:

> "But perhaps, it would be enough to say that if the judgment otherwise were a bar, the bar would be removed by the subsequent enactment of the Act of July 27, 1912, upon which, as well as upon the Act of 1902, this claim is based. * * * The Act of 1912, like that of 1902, created rights where they had not existed before, and the claimant's rights are not barred."

Petitioners submit this decides only that the subsequent legislation removed the alleged bar of the previous judgment. That such judgment against its officer constitutes no bar against the United States was entirely settled previously in *Carr* v. *United States*, 98 U. S. 433; in *United States* v. *Lee*, 106 U. S. 196, 222, and other decisions. In no wise does this *Sage* Case decide a taxpayer may not resist the Commissioner of Internal Revenue by claiming the parties settled the same issue in litigation between said taxpayer and a Collector whom the Commissioner defended. Yet the lower court has so held.

Briefly, the historical situation is that the Board of Tax Appeals has "appellate powers which are judicial in character" (*Blair* v. *Oesterlein Mach. Co.*, 27 U. S. 220), designed to afford taxpayers a redetermination of tax liabilities asserted by the Commissioner of Internal Revenue, and a further review of its decision in the Circuit Court of Appeals and in this Court (*Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 721).

By petition to the Board, the taxpayer in effect enjoins the Commissioner from assessment of tax pending subsequent judicial decision of the controversy. The Commissioner, sued therein as an officer of the United States, cannot successfully invoke the immunity of the United States (*United States* v. *Lee*, 106 U. S. 196; *Trudal* v. *Wesley*, 167 U. S. 204, 222; *Scranton* v. *Wheeler*, 179 U. S. 141, 153; *Wells* v. *Nickles*, 104 U. S. 444), nor is the immunity of the United States to be ascribed to such officer. The cited cases decided a judgment against its officer is not available against the United States.

There is a privity of duty between the Collector and Commissioner, notwithstanding they are separate officers, appointed by the President (R. S. 319, 3142); the Commissioner has general charge of the assessment and collection of taxes (R. S. 321), remits, refunds and pays back taxes illegally or erroneously collected, and repays the Collector all moneys recovered for taxes collected by him with the costs and expenses of suit (R. S. 3220); his discretion is not reviewable by any other officer of the Government (*Kaufman's Case*, 96 U. S. 568) and he may satisfy a judgment against a Collector without issue of a certificate of probable cause (*United States* v. *Frerichs*, 124 U. S. 315); the Collector gives bond in the amount prescribed by the Commissioner (R. S. 3143), sues for the recovery of taxes when authorized to do so by the Commissioner (R. S. 3214). A taxpayer may not sue a Collector to recover taxes except after previous presentation of his claim to the Commissioner (R. S. 3226). Thus both

are intimately related in their official duties, the Collector being substantially the agent of the Commissioner.

In *Second National Bank* v. *Woodworth, Collector,* 54 F. (2) 672, the Collector defended against the recovery of taxes on the ground claimant had previously been adjudged defeated in his prior action upon the same claim against the United States. The District Court, in finding the prior judgment protects the Collector as a Governmental agent and trustee, passes by the *Sage Case,* to rest its decision upon *Bank of Kentucky* v. *Stone,* 174 U. S. 799, wherein a decree enjoining a town from enforcing a tax was held to bar a similar proceeding against its board of assessors. In other words, the court holds that, although a judgment against an agent may not bind the principal, a judgment against a principal may be a bar as to an agent privy with such principal as to the subject matter in controversy.

In *Greylock Mills* v. *White,* 55 F. (2) 704, it is held that the judgment entered as the result of Board proceedings against the Commissioner, and judicial review thereof, is *res adjudicata* of all matters litigated therein, in a subsequent proceeding by the same taxpayer for recovery of the tax against a Collector. Thus, it is established by precedent that a Collector may invoke the protection of a judgment in favor of the United States or of the Commissioner involving the same taxpayer and same taxes.

But, herein, the West Virginia judgment is against the Collector, the agent, and not against his principals, either the United States or the Commissioner, and it appears the Commissioner joined with him and defended for him in perfect privity and concert against petitioner. To admit the resulting judgment is thereafter binding on both of them, does not concede or imply that it is likewise binding upon the United States, which neither consented to be sued in the proceeding, nor had declared by statute its responsibility for the resulting decree, as happened in *Minnesota* v. *Hitchcock,* 185 U. S. 373.

The privity of conduct between these officers established here of record must be ignored, in order to conclude that the judgment against the Collector is not binding upon the Commissioner of Internal Revenue, who assisted the Collector to defend the action—and this contradicts well recognized rules of law.

In *Beyer Co. v. Fleischmann Co.,* 15 F. (2) 465 (C. C. A. 6), where a similar situation prevailed, we read:

> "The general rule is that one who prosecutes or defends a suit in the name of another, to establish or protect some interest of his own, *or who openly assists in an action in aid of some such interest,* to the knowledge of the opposing party, is as much bound by the judgment as he would be if he had been a party of record. *Penfield* v. *Potts & Co.* (6 C. C. A.), 126 F. 475, 61 C. C. A. 351; *Greenwich Ins. Co.* v. *Friedman Co.* (6 C. C. A.), 142 F. 944, 74 C. C. A. 114; *Foote* v. *Parson, etc.* (6 C. C. A.), 196 F. 951, 118 C. C. A. 105; *Southern Pacific R. Co.* v. *United States,* 168 U. S. 1, 18 S. Ct. 18, 42 L. Ed.

355; *Souffront* v. *La Compagnie Des Suereries*, 217 U. S. 475, 30 S. Ct. 608, 54 L. Ed. 846." (Italics supplied.)

In *Souffront* v. *Compagnie*, 217 U. S. 475, 487, the same rule is again stated:

> "*The persons for whose benefit, to the knowledge of the court and of all the parties to the record, litigation is being conducted, cannot, in a legal sense, be said to be strangers to the cause.* The case is within the principle that one who prosecutes or defends a suit in the name of another, to establish and protect his own right, *or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly, to the knowledge of the opposing party*, is as much bound by the judgment, and as fully entitled to avail himself of it, as an estoppel against an adversary party, as he would be if he had been a party to the record. *Lovejoy* v. *Murray*, 3 Wall. 1, 18 L. Ed. 129." (Italics supplied.)

The lower court therefore erred in holding the Commissioner of Internal Revenue was entitled to the immunity of the United States, and, failure to give effect to the established facts as to the privity of the Collector and Commissioner is in conflict with the foregoing decisions of this Court and other Federal courts.

**Conclusion.**

The lower court decision operates to defeat the correct tax of net income contemplated by the Revenue Acts in this:

It purposes to tax as income a flow of wealth not taxable under the XVI Amendment.

It nullifies basic rules of property whereby income subject to tax is ascertained, and raises other rules not justified by the law or precedents.

It causes confusion in the property rights of taxpayers, and tends to injustice in the imposition of taxes.

It lays improper burdens upon taxpayers, both upon corporations and individual stockholders.

It produces a lack of uniformity in decisions of the several Circuit Courts of Appeals upon fundamental matters of taxation.

It tends to the continuance of litigation by not giving conclusive effect to judgments in proceedings involving the same subject matter between the same parties and their privies.

Petitioners therefore respectfully insist that the writs, here prayed for, should issue, and upon final hearing that the judgments of the Circuit Courts of Appeals for the Fourth Circuit should be reversed with proper directions that justice may prevail.

Respectfully submitted,

WELLS GOODYKOONTZ,
CAMDEN R. McATEE,
*Attorneys for Petitioners.*

MASON, SPALDING AND McATEE,
GOODYKOONTZ AND SLAVEN,
*Of Counsel.*

## APPENDIX.

### Constitution, Statutes and Regulations Involved.

*The Constitution of the United States.*

Amendment XVI (effective March 1, 1913).—The Congress shall have power to lay and collect taxes on incomes from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

*Individual Gross Income.*

*Revenue Act of* 1918—Section 213 (40 Stat. 1057-96, C. 18):

> "That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—
>
> "(*a*) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

*Revenue Act of* 1921—Section 213 (same as above). (42 Stat. 227, C. 136.)

*Revenue Act of* 1924—Section 213 (same as Revenue Act of 1918 above). (43 Stat. 253, C. 234.)

*Revenue Act of* 1926—Section 213 (same as Revenue Act of 1918 above). (44 Stat. (Part 2) 9, C. 27.)

*Individual Net Income.*

*Revenue Act of* 1918—Section 212 (*Idem.*):

> "That in the case of an individual the term 'net income' means the gross income as defined in section 213, less the deductions allowed by section 214."

*Revenue Act of* 1921—Section 212 (same as Revenue Act of 1918 above). (*Idem.*)

*Revenue Act of* 1924—Section 212 (same as Revenue Act of 1918 above). (*Idem.*)

*Revenue Act of* 1926—Section 212 (same as Revenue Act of 1918 above). (*Idem.*)

*Corporation Gross Income.*

Revenue Act of 1918—Section 233 (*Idem.*):

> "That in the case of a corporation subject to the tax imposed by section 230 the term 'gross income' means the gross income as defined in section 213, except that:" (Exceptions not material.)

*Revenue Act of* 1921—Section 233 (*Idem*):

> "That in the case of a corporation subject to the tax imposed by section 230 the term 'gross income' means the gross income as defined in sections 213 and 217, * * *." (Not material here.)

*Revenue Act of* 1924—Section 233 (same as Revenue Act of 1921 above). (*Idem.*)

*Revenue Act of* 1926—Section 233 (same as Revenue Act of 1921 above). (*Idem.*)

*Corporation Net Income.*

*Revenue Act of* 1918—Section 232 (*Idem*):

> "That in the case of a corporation subject to the tax imposed by section 230 the term 'net income' means the gross income as defined in section 233 less the deductions allowed by section 234, and the net income shall be computed on the same basis as is provided in subdivision (*b*) of section 212 or in section 226." (Omitted as relating only to accounting method.)

*Revenue Act of* 1921—Section 232 (*Idem*):

> "That in the case of a corporation subject to the tax imposed by section 230 the term 'net income' means the gross income as defined in section 233 less the deductions allowed by section 234."

*Revenue Act of* 1924—Section 232 (same as Revenue Act of 1921 above). (*Idem.*)

*Revenue Act of* 1926—Section 232 (same as Revenue Act of 1921 above). (*Idem.*)

*Meaning of Net Income.*

Article 21—(Reg. 45, years 1918, 1919, 1920) (Reg. 62, years 1921, 1922, 1923) (Reg. 65, year 1924) (Reg. 69, years 1925, 1926):

> "The tax imposed by the statute is upon income. In the computation of the tax various classes of income must be considered:
>
> "(*a*) Income (in the broad sense), meaning all wealth which flows in to the taxpayer other

than as a mere return of capital. It includes the forms of income specifically described as gains and profits, including gains derived from the sale or other disposition of capital assets. Cash receipts alone do not always accurately reflect income, for the statute recognizes as income-determining factors other items, among which are inventories, accounts receivable, property exhaustion, and accounts payable for expenses incurred. * * *

"(*b*) Gross income, meaning income (in the broad sense) less income which is by statutory provision or otherwise exempt from the tax imposed by the statute. * * *

"(*c*) Net income, meaning gross income less statutory deductions. The statutory deductions are in general, though not exclusively, expenditures, other than capital expenditures, connected with the production of income. * * *

"(*d*) Net income less credits. * * *

"The surtax is imposed upon net income; the normal tax upon net income less credits. Although taxable net income is a statutory conception, it follows, subject to certain modifications as to exemptions and as to deductions for partial losses in some cases, the lines of commercial usage. Subject to these modifications statutory 'net income' is commercial 'net income.' This appears from the fact that ordinarily it is to be computed in accordance with the method of accounting regularly employed in keeping the books of the taxpayer. As to the net income of corporations, see section 232 * * * and article 531."

Article 531—(Same Regulations):

*Net income.*—Net income is that portion of the gross income which remains after all proper deductions have been taken into account. The net income of corporations is determined in general in the same manner as the net income of individuals, but the deductions allowed corporations are not precisely the same as those allowed individuals. * * * The net income of corporations is to be computed on the same basis as to accounting periods as the net income of individuals."

Article 90—(Same Regulations):

*Income accrued prior to March* 1, 1913.—Any claim existing unconditionally on March 1, 1913, whether presently payable or not and held by a taxpayer prior to March 1, 1913, whether evidenced by writing or not, and all interest which had accrued thereon before that date, do not constitute taxable income, although actually recovered or received subsequent to such date. Interest accruing on or after that date is taxable income. Where an interest-bearing claim held on February 28, 1913, is paid in whole or in part after that date, any gain derived from the payment of the claim is taxable. The amount of such gain is the excess of the proceeds of the claim (both principal and interest) exclusive of any interest accrued since February 28, 1913, already returned as income, over the cost thereof (both principal and interest then accrued). However, the gain to be included in gross income where the fair market value of the claim as of March 1, 1913, is greater than

the cost thereof, is the excess of the amount received over such value. In the case of an insurance policy its surrender value as of March 1, 1913, may be used as a basis for the purpose of ascertaining the gain derived from its sale or other disposition. Where services were rendered prior to March 1, 1913, but paid for thereafter, the amount received is taxable income to the extent of the excess of such amount over the fair market value on March 1, 1913, of the principal of the claim and any interest which had then accrued."

*Corporation Deductions.*

*Revenue Act of* 1918—Section 234:

"That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions: * * *

"(9) In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted: *Provided*, That in the case of such properties acquired prior to March 1, 1913, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date: * * * In the case of leases the deductions allowed by this paragraph shall be equitably apportioned between the lessor and lessee;"

*Revenue Act of* 1921—Section 234 (same as Revenue Act of 1918 above). (*Idem.*)

*Revenue Act of* 1924—Section 234 (same as Revenue Act of 1918 above). (*Idem.*)

*Revenue Act of* 1926—Section 234 (same as Revenue Act of 1918 above). (*Idem.*)

Article 204—(same Regulations as above):

> "*Amount returnable through depletion and depreciation in the case of lessor.*—(*a*) In the case of a lessor, the amount remaining in any year returnable through depletion and depreciation deductions is (1) the value of his equity in the property at the basic date minus (2) depletion and depreciation sustained, whether legally allowable or not, from the basic date to the taxable year, plus (3) subsequent allowable capital additions, and minus (4) the value of the land at the basic date for other purposes than mineral production and the residual value of other property at the end of operations. The amount returnable through depletion is the total capital remaining less the sum recoverable through depreciation. The provisions of this paragraph do not apply to the computation of the depletion allowance in the case of oil and gas wells when such allowance is based on the income from the property.
>
> "(*b*) The values of the equities of lessor and lessee shall be computed separately, but, when determined as of the same basic date, shall together never exceed the value at that date of the property in fee simple. * * *
>
> "(*d*) The value of the lessor's equity in a mineral property under lease March 1, 1913, for the entire operating life of the mineral deposits is to be taken to mean (1) the cost or (2) the value as of March 1, 1913, of the royalties and

other payments to be expected under the terms of the lease in effect on that date, whichever is greater."

Article 215 (Regulations 45, 62, 65 above):

*Depletion-Adjustments of accounts on bonus or advanced royalty.*—(*a*) Where a lessor receives a bonus or other sum in addition to royalties, such bonus or other sum shall be regarded as a return of capital to the lessor, but only to the extent of the capital remaining to be recovered through depletion by the lessor at the date of lease. If the bonus exceeds the capital remaining to be recovered, the excess and all the royalties thereafter received will be income and not depletable. If the bonus is less than the capital remaining to be recovered by the lessor through depletion, the difference may be recovered through depletion deductions based on the royalties thereafter received. The bonus or other sum paid by the lessee for a lease made on or after March 1, 1913, will be his value for depletion as of date of acquisition."

Article 216 (215) (Regulations 69 above amending Article 215):

*Depletion-Adjustments of accounts based on bonus or advanced royalty.*—(*a*) Where a lessor receives a bonus in addition to royalties, there shall be allowed as a depletion deduction in respect of the bonus an amount equal to that proportion of the cost or value of the property on the basic date which the amount of the bonus bears to the sum of the bonus and the royalties expected to be received. Such allowance shall be deducted from the amount remaining to be

recovered by the lessor through depletion, and the remainder is recoverable through depletion deductions on the basis of royalties thereafter received."

*Dividends.*

*Revenue Act of* 1918—Section 201 (Idem):

"(*a*) That the term 'dividend' when used in this title (except in paragraph (10) of subdivision (*a*) of section 234) means (1) any distribution made by a corporation, other than a personal service corporation, to its shareholders or members, whether in cash or in other property or in stock of the corporation, out of its earnings or profits accumulated since February 28, 1913 * * *.

"(*b*) Any distribution shall be deemed to have been made from earnings or profits unless all earnings and profits have first been distributed. * * *

"(*c*) Any distribution made during the first sixty days of any taxable year shall be deemed to have been made from earnings or profits accumulated during preceding taxable years; but any distribution made during the remainder of the taxable year shall be deemed to have been made from earnings or profits accumulated between the close of the preceding taxable year and the date of distribution, to the extent of such earnings or profits, and if the books of the corporation do not show the amount of such earnings or profits, the earnings or profits for the accounting period within which the distribution was made shall be deemed to have been accumulated ratably during such period."

*Revenue Act of* 1921—Section 201 (Idem):

"(*a*) That the term 'dividend' when used in this title (except in paragraph (10) of subdivision (*a*) of section 234 and paragraph (4) of subdivision (*a*) of section 245) means any distribution made by a corporation to its shareholders or members, whether in cash or in other property, out of its earnings or profits accumulated since February 28, 1913. * * *

"(*b*) For the purposes of this Act every distribution is made out of earnings or profits, and from the most recently accumulated earnings or profits, to the extent of such earnings or profits accumulated since February 28, 1913; but any earnings or profits accumulated or increase in value of property accrued prior to March 1, 1913, may be distributed exempt from the tax, after the earnings and profits accumulated since February 28, 1913, have been distributed. * * *

"(*f*) Any distribution made during the first sixty days of any taxable year shall be deemed to have been made from earnings or profits accumulated during preceding taxable years; but any distribution made during the remainder of the taxable year shall be deemed to have been made from earnings or profits accumulated between the close of the preceding taxable year and the date of distribution, to the extent of such earnings and profits, and if the books of the corporation do not show the amount of such earnings or profits, the earnings or profits for the accounting period within which the distribution was made shall be deemed to have been accumulated ratably during such period.

This subdivision shall not be in effect after December 31, 1921."

*Revenue Act of* 1924—Section 201 (same as Revenue Act of 1921 above). (*Idem.*)

*Revenue Act of* 1926—Section 201 (same as Revenue Act of 1921 above). (*Idem.*)

Article 1542—(same Regulations):

"*Source of Distribution.*—For the purpose of income taxation every distribution made by a corporation is made out of earnings or profits to the extent thereof and from the most recently accumulated earnings or profits."

Article 1543—(same Regulations):

"*Distribution Out of Earnings or Profits Accumulated Prior to March* 1, 1913.—Any distribution by a corporation out of earnings or profits accumulated prior to March 1, 1913, or out of increase in value of property accrued prior to March 1, 1913 (whether or not realized by sale or other disposition prior to or on or after March 1, 1913), is not a dividend within the meaning of Title II. The provisions of the preceding sentence shall be applied uniformly to cases arising under the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, and the Revenue Act of 1924, as well as the Revenue Act of 1926. A corporation cannot distribute earnings or profits accumulated or increase in value of property accrued prior to March 1, 1913, exempt from tax, unless and until all earnings or profits accumulated since February 28, 1913, have been distributed. * * *

"In determining whether a dividend is out of earnings or profits accumulated since February 28, 1913, or prior to March 1, 1913, due consideration must be given to the facts, and mere bookkeeping entries increasing or decreasing surplus will not be conclusive. * * *"

Article 1546—(same Regulations):

"*Distributions from Depletion or Depreciation Reserves.*—A reserve set up out of gross income by a corporation and maintained for the purpose of making good any loss of capital assets on account of depletion or depreciation is not a part of surplus out of which ordinary dividends may be paid. * * * No distribution, however, can be made from such a reserve until all the earnings or profits of the corporation have first been distributed."